Office - Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-23

In The

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer, and ROBERT E. PALMER, Chaplain of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

PAUL L. DOUGLAS
Attorney General

SHANLER D. CRONK
Assistant Attorney General

2115 State Capitol
Lincoln, NE 68509-4906
Tel: (402) 471-2682

Counsel for Petitioners

COCKLE PRINTING CO., 2011 Douglas St., Omaha 68102

QUESTION PRESENTED

1. Whether the Nebraska Legislature's compensation and retention of a single individual as Chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment to the United States Constitution?

LIST OF PARTIES

In addition to petitioners Marsh and Palmer, also named as party defendants in respondent's original complaint were the members of the Legislature's Executive Board listed below. The district court dismissed these parties from the action after finding the use of a Chaplain recommended by the Board to give the morning prayers constitutional.

Frank Lewis,
John DeCamp,
Robert L. Clark,
Tom Fitzgerald,
Steve Fowler,
Howard A. Lamb,
Richard D. Marvel,
Loran Schmit, and
Jerome Warner, in their official capacities
as members of the Executive Board of the
Legislative Council of the Nebraska Unicameral.

TABLE OF CONTENTS

	Pages
Opinions Below	1
Grounds for Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations the Case Involves	3
Statement of the Case	6
The Nebraska Legislative Prayer Practice	6
Respondent and His Challenge to the Prayer Practice	9
The Legislative Chaplain	10
Judgments of the Courts Below	12
Summary of Argument	14
Argument:	
I. Opening each legislative day with prayer alone was found by both the district court and Court of Appeals not to violate the Establishment Clause and this determination has been conceded in the presentation of the case to this Court.	20
II. The Nebraska Legislature's traditional practice of beginning each day's sitting with a prayer standing alone is not violative of the Establishment Clause.	21
A. The Nebraska legislative prayers reflect an aged ceremonial tradition of both federal and state legislatures which has not led to the consequences the Establishment Clause is intended to prevent.	23

TABLE OF CONTENTS—Continued

Pages

B. The Nebraska legislative prayers have a clear secular purpose, have no primary effect advancing religion, and do not excessively entangle government and religion. 27

III. The compensation of the Chaplain has no purpose and effect other than to facilitate the legislative prayers, and thus, cannot render the entire prayer practice unconstitutional. 32

A. Nothing about cash payments from public funds as a form of aid is suspect under the Establishment Clause. 32

B. The findings that compensation of the Chaplain had the effect of promoting one religious view and engendered serious political division along religious lines is contrary to the evidence and was cited only as an outgrowth of the Chaplain's tenure. 35

IV. The retention of a single cleric as Legislative Chaplain for an extended period of time poses no Establishment Clause problem. 37

V. The occasional printing of prayer books by the Nebraska Legislature is of no independent significance in this case, but was of concern to the Court of Appeals only because it was perceived as stemming from the tenure of Chaplain Palmer. 41

Conclusion 43

TABLE OF AUTHORITIES

Pages

CASES

Anderson v. Salt Lake City Corp., 475 F. 2d 29 (10th Cir. 1973), *cert. denied*, 414 U. S. 879 (1973) 29

Aronow v. United States, 432 F. 2d 242 (9th Cir. 1970) 29

Colo. v. Treasurer and Receiver General, 392 N. E. 2d 1195 (1979) 27

Bradfield v. Roberts, 175 U. S. 291 (1899) 19, 39

Committee for Public Education v. Nyquist, 413 U. S. 756 (1973) 21, 28, 34, 40

Committee for Public Education & Religious Liberty v. Regan, 444 U. S. 646 (1980) 17, 29, 33

Engel v. Vitale, 370 U. S. 421 29

Grossberg v. Deuscibio, 380 F. Supp. 285 (E. D. Va. 1974) 27

Hunt v. McNair, 413 U. S. 734 (1973) 22, 23

Jackman v. Rosenbaum Co., 260 U. S. 22 (1922) 26

Lemon v. Kurtzman, 403 U. S. 602 (1971) 16, 21, 23, 28, 30, 31, 34, 37

Lincoln v. Page, 109 N. H. 30, 241 A. 2d 799 (1968) 27

McCollum v. Board of Education, 333 U. S. 203 (1948) 26

McDaniel v. Paty, 435 U. S. 618 (1978) 39

McGowan v. Maryland, 366 U. S. 420 (1961) 15, 16, 19, 23, 24, 25, 26, 28, 40

TABLE OF AUTHORITIES—Continued

Pages

Meek v. Pittenger, 421 U. S. 349 (1975) 23

Myers v. United States, 272 U. S. 52 (1926) 15, 25

O'Hair v. Cooke, No. A-77-CA-236 (1980) 27, 36

O'Hair v. Paine, 312 F. Supp. 434 (W. D. Tex. 1969), *aff'd*, 432 F. 2d 66 (5th Cir. 1970) 29

Roemer v. Maryland Public Works Board, 426 U. S. 736 (1976) 19, 22, 34, 39

School District of Abington Township v. Schempp, 374 U. S. 203 (1963) 26, 29, 30, 40

Tilton v. Richardson, 403 U. S. 672 (1971) 23, 24, 29

Walz v. Tax Commission, 397 U. S. 664 (1970) 15, 16, 22, 23, 24, 25, 26

Wiest v. Mt. Lebanon School District, 320 A. 2d 362 (1974) 27

Wood v. Mt. Lebanon Township School District, 342 F. Supp. 129 (W. D. Pa. 1972) 27

Zorach v. Clauson, 343 U. S. 306 (1952) 25

STATUTE

42 U. S. C. § 1983 6

No. 82-23

In The

Supreme Court of the United States

October Term, 1982

FRANK MARSH, State Treasurer, and ROBERT E. PALMER, Chaplain of the Nebraska Unicameral,

Petitioners,

vs.

ERNEST CHAMBERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The judgment and the memorandum of decision of the United States District Court for the District of Nebraska, Honorable Warren K. Urbom, Chief Judge, are reproduced as Exhibits B and C in the Petition for Writ of Certiorari beginning on pages App. 5, and App. 7 respectively. The decision is reported at 504 F. Supp. 585 (D. C. Neb. 1980).

The opinion of a three-judge panel of the Court of Appeals of the United States Court of Appeals for the Eighth Circuit, affirming in part and reversing in part the judgment of the district court and remanding the case for further action, is reproduced as Exhibit D in the Petition for Writ of Certiorari beginning on page App. 25. The opinion is reported at 675 F. 2d 228 (8th Cir. 1982).

———o———

GROUNDS FOR JURISDICTION

The judgment of the district court was entered on December 24, 1980, following trial to the court on December 1, 1980. Petitioners Palmer and Marsh timely appealed to the Court of Appeals for the Eighth Circuit only that the portion of the district court's judgment invalidating the expenditure of public funds to pay the Chaplain on the basis of the Establishment Clause, and respondent timely cross-appealed the portion of the district court's judgment finding the underlying prayer practice constitutional, and awarding attorney's fees. Following oral argument to the Court of Appeals on October 13, 1981, that court's opinion was entered on April 14, 1982.

Petitioners moved for a stay of the mandate pending the filing and disposition of their Petition for Writ of Certiorari which was granted by order dated May 12, 1982. The Petition for Writ of Certiorari was docketed in this court on July 6, 1982.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1), which authorizes the review of civil cases by writ of certiorari granted upon the petition of any party thereto after judgment of the Court of Appeals.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS THE CASE INVOLVES

1. *The First Amendment to the United States Constitution*

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

2. *The Fourteenth Amendment to the United States Constitution*

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. *42 U.S.C. § 1983*

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

4. *Article III, Section 10 of the Nebraska Constitution*

   [T]he Legislature shall determine the rules of its proceedings and be the judges of the election, returns, and qualifications of its members, shall choose its own officers, including a Speaker to preside when the Lieutenant Governor shall be

absent, incapacitated, or shall act as Governor.

. . .

5. *Nebraska Revised Statutes § 50-111 and §50-112 (Reissue 1978)*

50-111. **Legislature; officers; how selected.** The officers of the Legislature shall consist of a speaker, chief clerk, assistant clerk, sergeant at arms, and such other officers as may be deemed necessary for the proper transaction of business, to be elected by the Legislature upon the recommendation of the Executive Board of the Legislative Council, except that the board shall make no recommendation as to the speaker.

50-112. **Officers and employees; salaries; how fixed.** There shall be paid to each of the several officers, except the speaker, named in section 50-111 for their official services such salaries as shall be fixed by the Executive Board of the Legislative Council, unless otherwise directed by the Legislature.

6. *Rule 1, Sections 1, 2 and 21 of the Rules of the Nebraska Unicameral*

RULE 1—OFFICERS AND EMPLOYEES

A. Election of Officers

Section 1. Officers To Be Elected. At the commencement of each regular session in odd-numbered years the Legislature shall nominate from the floor and elect by secret ballot the following officers:

Speaker

Chairman of Committee on Committees

Chairman of Executive Board

Vice Chairman of Executive Board

6 Members of Executive Board (See footnote)

Before the ballot is taken each person so nominated may make a public statement to the Legislature indicating what the Legislature may expect from him or her in the area of the responsibility

of such office. The officers so elected shall hold such office for a period of two years.

The Legislature elects two from legislative districts Nos. 1, 2, 15, 16, 23 through 30, 32 through 35, and 46; two from legislative districts Nos. 3 through 14, 20, 31, and 45; and two from legislative districts Nos. 17 through 19, 21, 22, 36 through 44, and 47 through 49. Speaker is member of Board; Chairman of Appropriations is nonvoting member; R. R. S. 50-401.01.

Section 2. Officers To Be Approved. In addition, the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council for the following officers:

Chief Clerk of the Legislature
Assistant Clerk of the Legislature
Sergeant at Arms
Chaplain

. . .

. . .

Section 21. Chaplain. The Chaplain shall attend and shall open with prayer each day's sitting of the Legislature.

7. *Rule 7 (A), Section 1 (b) of the Rules of the Nebraska Unicameral*

RULE 7—PROCEDURES AND MOTIONS

(A) Order of Business

Section 1. Meeting Time, Restrictions. . . .

(b) The order of business of the Legislature shall be as follows; except as otherwise provided by the Speaker.

a. Prayer by the Chaplain
b. Roll call
c. Call for correction of the Journal
d. Petitions and memorials

. . .

. . .

STATEMENT OF THE CASE

Respondent, a duly elected member of the Nebraska Unicameral Legislature, brought this action under 42 U. S. C. § 1983 to "remove the religious content from the Nebraska Legislature and to prevent the expenditure of public funds for such purpose". (J. A. 3) He alleges that the existence of a Chaplain delivering morning prayers before the Legislature, the expenditure of public funds for the Chaplain's salary, and the expenditure of public funds for recording the daily prayers and subsequently printing them in prayer books violated his rights guaranteed by the First Amendment of the United States Constitution. (J. A. 6)

His prayer for relief requested that members of the Legislature's Executive Board be enjoined from implementing legislative rules authorizing the recommendation of a Chaplain each new legislative session, that Robert E. Palmer be enjoined from assuming the post of Chaplain and from receiving any compensation, and that Frank Marsh, State Treasurer, be enjoined from expending public funds for the payment of Palmer's salary and the printing of the prayer books. Respondent further requested that legislative rules authorizing the selection of a legislative Chaplain be declared unconstitutional, void and unenforceable. (J. A. 6-7)

The Nebraska Legislative Prayer Practice

The Nebraska Unicameral Legislature convenes its biannual sessions in the capitol city of Lincoln, a community of approximately 150 churches, over 100 of which are non-Catholic, and a Jewish Synagogue and Temple. (J. A. 52-53) The Legislature's use of a Chaplain to begin

each day's sitting with a prayer began as early as 1855, twelve years before Statehood. From 1867 to 1973, state statutes authorized a Chaplain as an officer and employee of the Legislature for that purpose, and also authorized compensation. These statutory provisions were terminated in 1973, but the internal rules of the Unicameral since then have required its Executive Board, which is responsible for the administrative functioning of the Legislature, to recommend a Chaplain for each session to the Legislature for its approval, and they further provide that the duty of the Chaplain will be to attend an opening day's sitting with prayer. (Pet. App. 11)

By express provision of the Nebraska State Constitution, the Legislature is authorized to determine the rules of its own proceedings and choose its own officers. (Supra, p. 3) The Chaplain is one of four, traditional non-legislator officers approved upon recommendation of the Executive Board pursuant to Legislative Rule 1, Section 2, rather than by nomination and election by secret ballot from the floor, as is the case with the other officers. (Supra, p. 5) Regarding the four non-legislator officers, the Board's responsibility is to place in the hands of the Speaker of the Legislature on the first day of each biannual session the name of an individual nominated as Chaplain. Each member of the Executive Board has an equal voice in the nominating process. All that is required for a nomination to go forward is that it receive a majority of five votes. (J. A. 65-66)

As a practical matter, the Executive Board has not found it necessary over the history of the Legislature to involve itself regularly in a detailed search and selection

process for nominating the four traditional officers. (J. A. 65) The selection of a Chaplain in particular has not been that big of an issue and has been handled in a perfunctory manner. (R. 116, 121) There was a deviation from the usual process in 1979, due to confusion over whether the incoming or outgoing Executive Board was to make the recommendation. The two boards apparently made different nominations so the matter was taken directly to the floor where Palmer was approved as Chaplain for the ensuing session. (R. 118-120)

The Executive Board also sets the compensation of the officers and employees of the Legislature pursuant to authority vested in it by relevant statutes charging it with responsibility of carrying out the ongoing administrative functions of the Legislature. (J. A. 63)

As required by legislative rules, the morning prayer by the Chaplain is the first order of business of the Legislature each day and occurs at 9:00 a. m. after the call to order. At that time, members of the public are rarely in the galleries. (J. A. 71) There is no official policy of the Legislature with respect to the Chaplain other than that the office is part of the Legislature's historical precedent and ceremony, as is also the case with the Clerk and Sergeant at Arms. (J. A. 63) Frank Lewis, Executive Board Chairman, testified that in his view Chaplain Palmer has been retained for several sessions because he has undertaken the Chaplain's job in a satisfactory way without the injection of any degree of religious dogma into the office which, had it occurred, would have necessitated a change. (J. A. 68)

In three past years, 1975, 1978, and 1979, upon separate motions from the floor, the Legislature approved the printing of assorted prayers in a small book for distribu-

tion to the legislative membership, and to anyone else on request. 200 copies of the 1975 and 1978 books, and 100 copies of the 1979 book were printed. (J. A. 13)

Respondent and His Challenge to the Prayer Practice

Respondent Ernest Chambers, of Omaha, Nebraska, has been a duly elected member of the State Legislature since 1970. He described in detail his strict, fundamentalist Christian upbringing which he characterized as "a religious straight jacket." (J. A. 27-29) While he avoids attempting to label his beliefs, he does not believe in anything supernatural and adheres to no particular religion to the extent that the term implies belief in some spiritual or supreme being. He knows for certain that he is a non-Christian. (J. A. 21-22)

Chambers objects to the overall legislative prayer practice principally because of the content of the prayers —that is, he does not believe in what he perceives the prayers to deal with. He considers the morning invocations to be a religious ceremony improper for the Legislature to be involved with and to pay for with public funds. (J. A. 23) Accordingly, he excuses or absents himself from the legislative chamber each morning during the time that the prayer is given, sometimes standing just outside the chambers, sometimes going back to his office. No attempt is made to prevent him from doing so. (J. A. 22)

The other members of the Legislature are aware of his sensitivities and he testified that his views were expressed to the Chaplain in January of 1979. (R. 6) It was at that time that Chambers, as a member of the Executive Board, attempted to get the Board to do away with the position of Chaplain, and failing that, to at least terminate his compensation. This attempt was unsuccessful. (R. 7)

He stated on cross-examination that he would object to the prayer practice even if no compensation was involved, or if the Chaplain were someone other than Robert Palmer. He further stated he would object even if the morning prayers were given by lay persons. (J. A. 30-31) Even if the invocation contained no religious references he would object to it being offered by a Chaplain because he feels that the designation "Chaplain" by definition is religious. (J. A. 34)

The Legislative Chaplain

Petitioner Robert Palmer is a Presbyterian clergyman who has been affiliated with Westminster Presbyterian Church in Lincoln since 1963. In 1965, after the death of the then Legislative Chaplain, Palmer allowed his name to be submitted for consideration as successor upon the suggestion of friends. (J. A. 41) Palmer's church has no official policy or position on his service as Chaplain. He endeavors in his own right to become involved in community activities for which he may personally have time, but any such decision is an individual decision on his part and means taking extra time out of his day, rather than time away from the church and his responsibilities to it. (J. A. 50-51)

He and several other clergypersons were interviewed by the Legislature's Executive Board and he was selected as Chaplain. (J. A. 41) He was informed during his interview that the duty of the Chaplain was to provide the morning prayer to open each day's sitting, but received no further directive or input from the Executive Board, then or subsequently, as to the content of the prayers. His perception was that as a result of the tradition and history of the Legislature, a part of the morning ceremony was the offering of the prayer or a time of meditation, similar

in purpose to invocations he's offered at other public ceremonies such as high school baccalaureates. (J. A. 41-42)

Palmer testified that he never has made salary a point of his being Chaplain and did not know the amount of any remuneration in 1965. (J. A. 74) The compensation has increased gradually over the years and currently amounts to approximately $320.00 a month for each month the Legislature sits. Payment is by check made out to Palmer personally which he deposits in his personal bank account. (J. A. 50)

A general process is employed in conceiving the legislative prayers. He attempts to write out each morning's prayer in advance of its offering, and bases them on conversations he had with the senators or on something he had seen or heard in the media in an attempt to incorporate something of the spirit and flavor and point of that particular day into his prayers. He stated his purpose and hope in offering the prayers is to provide a reminder for those present that they are called upon and being watched in the hope that they might do their very best in their deliberations and discussions and committee responsibilities for that day. (J. A. 43-44)

He incorporates into his prayers secular writings and religious references that he believes to be common to what he termed the Judeo-Christian heritage or civil religion of America. In this way, his references are reflective of religious expressions that are common to most Americans, and the legislative membership. (J. A. 44-45) However, he stated that he does his best to avoid an emphasis on any particular faith or sect or group in his religious references, (J. A. 49) and has made it a specific point never to inquire about the religious composition of the Legislature. (Pl. Ex. 5, p. 42, R. 1) Palmer testified that he

does not intend in his morning prayers to attempt to proselytize anyone to his particular church or faith, nor to try to convince somebody to any other particular point of view. (J. A. 61) He knows of no one who has joined his church because of his service as Legislative Chaplain, nor has he observed any other effect of his service outside the legislative chamber. (R. 79)

During his tenure as Chaplain, Palmer recalls only two occasions when he was made aware that someone's sensibilities were offended by the morning prayer practice. Both occurred in 1980. The first resulted from the concern of a Jewish senator after a prayer offered by a substitute cleric. Palmer stated that from that point on he deleted any reference to Jesus or Christ in his prayers in deference to the sensibilities that had been offended. The second occasion was his learning from the media of respondent's objection to the prayer practice. (J. A. 49)

Throughout Palmer's tenure, the occasion often has arisen for visiting clergypersons to provide the morning offering, either because of his absence or because a senator would request a clergyperson of his or her choosing. Without exception every request for or by another clergyperson to offer the prayer was honored. Clergypersons have included those from faiths other than Christianity, including the Jewish faith. (J. A. 46-47) Additionally, Palmer has made attempts to solicit other clergypersons to volunteer to deliver the offering. These attempts have met with difficulty for the reason that to so appear often was a real imposition on their busy time schedules, particularly for those who reside outside the city of Lincoln, and an economic imposition as well. (J. A. 90-91)

Judgments of the Courts Below

The district court found that the Legislature's use of a cleric to offer the morning prayers alone was not viola-

tive of the Establishment Clause, such practice having the "clearly secular purpose of bringing the legislators to order by means of a brief, solemn and thoughtful act in a traditional manner", having a primary effect "neither to advance nor to inhibit religion", and entangling "the state in religious affairs only nominally." (Pet. App. 13-18)

However, the district court found paying from public funds for both the printing and distributing of the prayer books and the compensation of the Chaplain violated the Establishment Clause for separate reasons. The printing of the prayer books was found to have no secular purpose. (Pet. App. 18) The compensation of the Chaplain was concluded to have the direct and immediate effect of "securing a firm and continuing relationship with a particular cleric of one denomination to the virtual exclusion of all others for at least the several-month session of the Legislature." (Pet. App. 19-20)

The Court of Appeals purported to employ a somewhat different analysis of the prayer practice than was used by the District Court. It first asserted that since the legislative prayer practice was challenged in its entirety, its several components could not be separated and independently examined for Establishment Clause validity, as was done by the district court, but rather, that the practice must be viewed as a whole. (Pet. App. 33-34) So viewed, the Court of Appeals concluded that the Nebraska prayer practice violated all three elements of the tripartite Establishment Clause test. It first found that the purpose of the practice as a whole must be to advance and give preference to one religious view over the others for the simple reason that "[t]here is little other reason for singling out one minister of one denomination for such extended period of time," and for publishing his prayers under state auspices. (Pet. App. 36)

The primary effect of the practice as a whole next was found "unmistakably to advance religion and to give preference to one religious view. The state has placed its offficial seal of approval on one religious view for sixteen years and has stood behind that seal with its funds —both to compensate the minister and to publish his prayer books." (Pet. App. 36-37)

Finally, the court found that the prayer practive as a whole entangled the state with religion because the use of state funds to compensate the "same minister for six teen years and to publish his prayer books" engendered serious political division along religious lines. (Pet. App. 37) Not a single reference to the record, nor citation to authority, was made in stating and explaining the controlling conclusions. However, the court did take care in pointing out that it did not rule unconstitutional legislative prayers by Chaplains *per se,* nor did it rule unconstitutional the possibility of paid legislative Chaplains under other circumstances.

So finding, the Court of Appeals affirmed in part and reversed in part the district court's judgment and remanded the case for further action.

SUMMARY OF ARGUMENT

1. The question presented herein for review is whether the compensation and tenure of the Nebraska Legislative Chaplain renders the Nebraska legislative prayer practice as a whole violative of the Establishment Clause. The answer turns on the constitutional soundness of legislative prayers standing alone. Both the district court and the Court of Appeals for the Eighth Circuit expressly concluded that beginning each legislative day with prayer is permissible under the Establishment

Clause. This determination was not contested by respondent by the filing of a cross-petition for writ of certiorari, nor was it added to petitioners' question presented for review to this court in its grant of limited certiorari. Consequently, this underlying question may be considered conceded in the disposition of this cause.

2. Should the court be compelled to address the constitutionality of having legislative prayers at all, the conclusion must be that they pose no Establishment Clause problem standing alone.

(A) This court has made clear that the Establishment Clause does not require absolute and total separation of government and religion. In adopting the concept of benevolent neutrality, the Court has advised that the clause proscribes only that sponsorship, financial support, and active involvement of the sovereign and religious activity intended to establish or interfere with religious beliefs and practices or having the effect of doing so. *Walz v. Tax Commission*, 397 U. S. 664 (1970). *Walz*, and *McGowan v. Maryland*, 366 U. S. 420, the only two Establishment Clause cases in this century not involving government and education, were decided largely on the basis of historical considerations which are directly applicable to this case, and alone are dispositive thereof.

The Nebraska legislative prayers traditionally have been employed to begin each legislative day since before statehood more than a century ago. The identical practice has existed elsewhere from the earliest days of this country, and in particular, within the federal houses of Congress. Legislative prayers received the *de facto* approval of those responsible for the drafting of the religion clauses, which fact is of special and great weight when interpreting them in the contemporary setting. *Myers*

v. United States, 272 U.S. 52, 175 (1926). Legislative prayers enjoyed widespread acceptance throughout the states from early in the history of country up to the present, and they have been accepted as valid without extended discussions in prior decisions of this court. Finally, history tells us that legislative prayers do not represent any realistic potential for the kind of strife the Establishment Clause was intended to prevent, because no such strife has ever surfaced as a result thereof.

These were the very considerations singled out by the court in upholding tax exemptions for church property in *Walz*, and state Sunday closing laws in *McGowan*. They support the same conclusion with respect to legislative prayers.

(B) Legislative prayers also pass muster under the more often applied purpose-effect-entanglement test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The legislative prayers have the clear secular purpose of bringing the Legislature to order each day by means of a brief, solemn and thoughtful act in a traditional manner. This was the express finding of both of the courts below. Consistent therewith, employing legislative prayers for such a purpose has no direct and immediate effect of advancing religion which would render them impermissible. Considered in the light of the fact that the audience to whom the prayers are directed is a group of mature adults who themselves have authorized the prayers for essentially ceremonial purposes, it simply can't be said that the prayers go so far as to have the effect of inculcating religious values or establishing a state church. To be impermissible the effect must be to *advance* religion rather than merely acknowledge its place in our heritage, which is the only effect of legislative prayers.

The legislative prayers involve no excessive entanglement between government and religion. No religious institutions are benefited, since the Chaplain is retained, not as the representative of any particular church, but as an individual. The only administrative involvement of the Legislature with the prayers is a simple majority vote of the Executive Board, approved by the full Legislature, recommending a Chaplain. From that point on during ensuing two-year session, the Chaplain is solely responsible for the prayers, with no input or oversight coming from the Legislature. There simply is no resulting relationship between the state and any religious authority.

3. Compensation of the legislative Chaplain does not render the prayer practice suspect merely because the government involvement or aid takes the form of cash payments from public funds. *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 658 (1980). The reason for this proposition is obvious. The Establishment Clause concern stems not from the form of government aid, but rather from the use to which the aid or assistance is put. Applying that principle here, so long as the legislative prayers themselves are constitutionally permissible, the state may compensate someone to ensure that they are provided.

4. The record reveals a practical necessity for the Legislature to pay for the legislative prayers to be provided. Clergy residing in and around Lincoln have demonstrated reluctance to volunteer to give the morning prayer even on single occasions, indicating that such a request is an imposition on their time and expressing concern about traveling expenses. Chaplain Palmer revealed that preparing the prayer each day takes time and effort. The likelihood that any one particular cleric would con-

sent to volunteer to provide legislative prayers for the duration of a two-year session is virtually nonexistent. It has only been by hiring a single individual for that purpose that the Legislature has been able to ensure the provision of the prayers at a minimum of administrative inconvenience.

5. The principal objection of the Court of Appeals to the Nebraska legislative prayer practice actually is seen to be the tenure of the Chaplain serving at the time the action was filed, petitioner Palmer. The court cited the compensation only as reinforcing the impermissible effect it found attributable to Palmer's tenure, namely, the perceived preference for one view of religion to the exclusion of others.

(A) Not only does the record totally fail to support the finding of actual preference, it does reveal a very practical, as well as secular, purpose for retaining a particular Chaplain over a period of time. The Legislature has always viewed the legislative prayer practice as maintenance of a longstanding internal tradition. To that end, the Chaplain is retained as a ceremonial officer an employee of the Legislature. By virtue of its ceremonial nature, the prayers have never been viewed as that big of an issue within the legislative process and have not engendered any controversy in over 125 years. Understandably, then, the selection of a Chaplain has been undertaken over the years in a perfunctory manner requiring a minimum of administrative effort. That a single Chaplain has been retained for successive sessions is the best confirmation of the fact that neither he nor his prayers have engendered the kind of controversy that might pose problems under the Establishment Clause. To require the Legislature to regularly employ different clerics

as Chaplain would mean to force the Legislature to engage in regular detailed selection processes and oversight which would run the risk of excessively entangling government and religion.

(B) The Court of Appeals concluded that to retain a single cleric as Chaplain for too long a time would at some point be tantamount to the preference of one religion over others because of that cleric's affiliation with one religious denomination. This is nothing less than a determination that a cleric cannot serve beyond a particular point in time simply because of the fact that he is a cleric. As this court concluded in *Roemer v. Maryland Public Works Board*, 426 U. S. 736, 746 (1976), the early case of *Bradfield v. Roberts*, 175 U. S. 291 (1899), dispelled any notion that a cleric, or even a clerical order, cannot be employed by the state in the performance of secular tasks. In failing to be mindful of this well-settled principle, the Court of Appeals' decision discriminated against Chaplain Palmer on the basis of his religion.

(C) Even if it might be that some might perceive the Legislature as having a preference for a particular religious view because of the lengthy tenure of a particular Chaplain, this effect hardly amounts to the kind of *direct* and *immediate* effect beneficial to religion required to contravene the Establishment Clause. Were it otherwise so, *McGowan v. Maryland, supra*, would never have been decided as it was for Sunday closing laws undeniably fostered respect for religious observances and facilitated church attendance, as this court recognized.

ARGUMENT

I.

Opening Each Legislative Day With Prayer Alone Was Found by Both the District Court and Court of Appeals Not to Violate the Establishment Clause and This Determination Has Been Conceded in the Presentation of the Case To This Court.

Reaffirming the conclusion reached in virtually every reported decision addressing the constitutionality of opening invocations at public gatherings, both the district court and the Court of Appeals expressly found the longstanding practice of the Nebraska Legislature to begin each day with a prayer alone was not violative of the Establishment Clause. It was the compensation and retention of the Chaplain which were cited as being proscribed by the clause.

Respondent did not challenge this conclusion of the Court of Appeals by cross-petitioning to this court as he had challenged the same conclusion of the district court by cross-appealing to the Court of Appeals. Moreover, this Court did not put this determination at issue in its grant of limited certiorari. Consequently, it would appear that the Court can proceed to analyze the compensation and tenure issues without questioning the finding that the legislative prayers alone present no Establishment Clause problem. The only question before the court is whether the fact that the Nebraska Legislative Chaplain has been compensated and retained for 16 years transforms an otherwise constitutional legislative prayer practice into an unconstitutional one.

Notwithstanding the foregoing, petitioners are compelled for two reasons to demonstrate that the conclusions

of the lower courts regarding legislative prayers were correct before presenting arguments on the elements of compensation and tenure. First, they anticipate respondent's argument will once raise the issue, notwithstanding his failure to cross-petition for writ of certiorari. Second, since the essence of petitioners' own argument is that neither the compensation nor the tenure of the Chaplain have any purpose, effect, or significance independent of the offering of the prayers each legislative morning, and thus cannot render the entire prayer practice violative of the Establishment Clause, this court must be left with no doubt that the prayers alone are constitutionally permissible.

II.

The Nebraska Legislature's Traditional Practice of Beginning Each Day's Sitting With a Prayer Standing Alone Is Not Violative of the Establishment Clause.

That the Establishment Clause decisions emanating from this court have resulted in confusion and uncertainty is well-documented and need not be addressed in detail here. It suffices to begin the analysis of the Nebraska legislative prayers by recognizing the now well-settled proposition that the Establishment Clause does not reflect a strict, no-aid concept, nor does it prohibit state activities which might aid religion only indirectly or incidentally. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973). "Our prior holdings do not call for a total separation between church and state; total separation is not possible in an absolute sense; some relationship between government and religion is inevitable." *Lem-*

on v. Kurtzman, 403 U. S. 602, 614 (1971).[1] Rather, the court has embraced the concept of "benevolent neutrality" which recognizes that the tension between the Free Exercise and Establishment Clauses, the need to avoid hostility by government toward religion, and the need to avoid the destruction of harmless tradition, require that some accommodation of religion by government be permissible.[2]

We are advised by the Court in *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970), that what the Establishment Clause proscribes is "sponsorship, financial support, and active involvement of the sovereign and religious activity," and that "the ultimate value judgment the Establishment Clause requires be made must turn on whether the particular activities or conduct in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Id.* at 669.

To aid in the determination of whether particular liaisons between government and religion are tantamount to the kind of sponsorship, financial support, and active involvement of government and religion proscribed by the Establishment Clause, this Court has evolved assorted analytical guidelines. The most familiar of these is the purpose-effect-entanglement test usually traced to the de-

---

[1] In *Roemer v. Maryland Board of Public Works*, 426 U. S. 736, 747-48 (1976), Mr. Justice Blackmun, speaking for the majority stated "*Everson* and *Allen* put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity"; *Hunt v. McNair*, 413 U. S. 734, 742 (1973), wherein Mr. Justice Powell, speaking for the majority stated "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected."

[2] *See, Walz v. Tax Commission*, 397 U. S. 664, 669 (1970). (Majority Opinion of Burger, C.J.).

cision in *Lemon v. Kurtzman, supra,* but the Court has repeatedly recognized and admonished us that the tests of this nature "are no more than helpful signposts", *Hunt v. McNair,* 413 U. S. 734, 741 (1973), and "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger,* 421 U. S. 349, 358-59 (1975). *See also, Tilton v. Richardson,* 403 U. S. 672, 677-78 (1971).

This admonition is of particular application in this case for two reasons. First, the tripartite test was born, honed, and refined in a series of cases involving government aid to nonpublic schools. In fact, in this century all but two Establishment Clause cases have been concerned with the clash of government and religion in the schools.[3] Thus, that the test might be ill-suited for application in this case, which does not deal with the educational setting, should not be surprising. Second, the two non-school cases bear a striking resemblance to, and can be dispositive of, this case. Petitioners submit that the constitutionality of the legislative prayers is clear no matter to which analytical guidelines resort is had, but further submit that the court need look no further than to *Walz v. Tax Commission, supra,* and *McGowan v. Maryland,* 366 U. S. 420 (1961).

A. The Nebraska legislative prayers reflect an aged ceremonial tradition of both federal and state Legislatures which has not led to the consequences the Establishment Clause is intended to prevent.

---

[3] *Walz v. Tax Commission,* 397 U. S. 664 (1970) (declared the constitutionality of tax exemptions for religious institutions) and *McGowan v. Maryland,* 366 U. S. 420 (1961) (approved state Sunday closing laws).

In *McGowan v. Maryland, supra,* this court found that state Sunday closing laws, having the purpose and effect of providing a uniform day of rest for all citizens, did not violate the Establishment Clause, nothwithstanding that Sunday was of particular significance to the predominant religious sect and would have the undeniable consequence of facilitating and encouraging church attendance. *McGowan* also held that the fact that such a traditional practice may have had a predominantly religious purpose originally was of no consequence if a legitimate secular purpose and effect could be determined at present. *Walz v. Tax Commission, supra,* found that tax exemptions granted to church property were not a violation of the Establishment Clause, nothwithstanding that such exemptions did indeed result in some economic benefit to churches.

Several factors present and largely dispositive in both *McGowan* and *Walz* are present in the case at hand and can similarly be dispositive here. First, the challenged practices had existed from the earliest days of this country. *McGowan,* 366 U. S. at 431-435; *Walz,* 397 U. S. at 677-78. The Nebraska legislative prayers have existed since 1855, twelve years before statehood, and even then were only a late coming counterpart to the legislative prayers of the federal House and Senate as is revealed by the amicus brief of the United States.

Second, the challenged practices received the *de facto* approval of those most familiar with the purposes of and the debates on, the religion clauses of the First Amendment — that is, the earliest members of the Virginia General Assembly and the United States Congress. *McGowan,* 366 U. S. at 437-40; *Walz,* 397 U. S. at 676-78. This point is particularly compelling inasmuch as this

court has acknowledged that the Construction given constitutional provisions by the first Congress is of special and great weight in interpreting those same provisions in the contemporary setting. *Myers v. United States,* 272 U. S. 52, 174-175 (1926). As the amicus brief of the United States Government again reveals, the founding fathers gave their approval to legislative prayers at the very time the First Amendment was being drafted.

Third, the challenged practices enjoyed widespread acceptance throughout the states. *McGowan,* 366 U.S. at 435; *Walz,* 397 U. S. at 676. That this also is true with respect to legislative prayers is established by the survey of the states contained in the amicus brief of the National Conference of State Legislatures, and specifically was acknowledged by the District Court in its memorandum of decision. (Pet. App. 10)

Fourth, the challenged practices have been accepted as valid without extended discussions in prior decisions of this Court. *McGowan,* 366 U. S. at 435-37; *Walz,* 397 U. S. at 679-80. Such also is the case with legislative prayers. Several of the justices of this Court instrumental in setting the parameters of permissible interaction between government and religion have concluded that legislative prayer practices are not suspect under the Establishment Clause. These expressions are probably best typified by Mr. Justice Douglas' conclusion in *Zorach v. Clauson,* 343 U. S. 306 (1952), wherein writing for the majority he stressed that the Establishment Clause did not require the adoption of a philosophy of hostility to religion, the result of which would be that:

> [p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holi-

> day; "so help me God" in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Id at 312-13.[4]

All of the factors moving the Court to sustain the longstanding traditional practices in *McGowan* and *Walz* are present in this case. One additional factor, tacitly acknowledged in *McGowan* and expressly recognized in *Walz*, of perhaps greatest significance is that continuation of such traditional practices over a period of some 200 years simply has not produced the kind of strife against which we are protected by the Establishment Clause. *See, Walz*, 397 U. S. at 678. This is similarly true of legislative prayer practices and due, no doubt, to the fact that they always have been and remain merely traditional ceremonies. As this Court observed long ago, "if a thing has been practiced for 200 years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 31 (1922). There is no basis in this record to support a conclusion that the Nebraska legislative prayers in any realistic way are "intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz, supra*, at 669.

---

[4] See also, Mr. Justice Reed's dissent in *McCollum v. Board of Education*, 333 U. S. 203, 253 (1948); Mr. Justice Black's majority opinion in *Engel v. Vitale*, 370 U. S. 421, 435, n. 21 (1962); Mr. Justice Clark's majority opinion in *School District of Abington Township v. Schempp*, 374 U. S. 203, 213 (1963); and Mr. Justice Brennan's concurrence therein at 299-300.

B. The Nebraska legislative prayers have a clear secular purpose, have no primary effect advancing religion, and do not excessively entangle government and religion.

1. Purpose

Neither of the two courts below hesitated in finding the Nebraska legislative prayers to have a clear secular purpose under the tripartite test. The District Court found that purpose to be the bringing of the Legislature to order by means of a brief, solemn and thoughtful act in a traditional manner. (Pet. App. 13) The Court of Appeals went so far as to recognize that this case falls within what it labeled the "ceremonial prayer" category which, as it had stated two years earlier in *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979) had a clearly secular purpose of establishing a solemn atmosphere and a serious tone for public gatherings. (Pet. App. 35) On this point, the decisions of the lower courts comport with the unanimous judicial view of opening invocations at public gatherings.[5]

The record amply supports this finding. Executive Board Chairman Lewis testified that the morning prayer practice had been retained over a time as part of the tradition and ceremony of the Legislature and not to advance any religious view. (J. A. 62) Chaplain Palmer's pur-

---

[5]*Colo. v. Treasurer and Receiver General*, 392 N. E. 2d 1195 (1979) (approving the use of a legislative chaplain to open legislative sessions with prayer); *Bogen v. Doty*, 598 F. 2d 1110 (8th Cir. 1979); *O'Hair v. Cooke*, No. A-77-CA-236 (unreported decision of the District Court for the Western District of Texas, Austin Division (1980)); and *Lincoln v. Page*, 109 N. H. 30, 241 A. 2d 799 (1968) (upholding the opening of county board and city council meetings with prayer); *Grossberg v. Deuscibio*, 380 F. Supp. 285 (E. D. Va. 1974), *Wiest v. Mt. Lebanon School District*, 320 A. 2d 362 (1974), and *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 129 (W. D. Pa. 1972) (upholding prayers and invocations at public high school graduations).

pose each morning is to put the legislators in a frame of mind of a high attainment and to cause them to reflect on their responsibilities and obligations to the citizens of the state. (J. A. 41-42, 45) Respondent's evidence did not attempt directly to refute any secular purpose for the prayers. Rather, the essence of his argument has been that since the prayers incorporate religious references and are given by a cleric, the court should infer that the prayer practice principally was intended to have a religious purpose. Not only does he ask for improper inferences of fact, but he totally fails to countervail the abundant evidence of secular purpose. The "absence of any substantial legislative purpose other than a religious one" *McGowan, supra* at 468, is squarely refuted by the record clearly proves one up.

2. The Nebraska Legislative Prayers Have no Primary Effect That Advances Religion.

Whether an interaction between government and religion has a primary effect of actually advancing or inhibiting religion, rather than merely acknowledging or referring to religion, is perhaps the most subjective inquiry of the *Lemon* test. The Court has clarified that it is a "direct and immediate" effect of advancing religion which is of concern. *Committee for Public Education v. Nyquist,* 413 U. S. at 784, n. 39, as opposed to merely an "indirect", "remote", or "incidental" effect on religion. *Id.* at 771.

More importantly, the court has made clear that by its use of the term "advancing religion" it contemplates more than an effect that in any realistic sense only acknowledges religion's place in the American experience.

Throughout the cases, the consequence which the primary effect part of the test is intended to identify has

been characterized in different ways. For example, it was "religious indoctrination" which was of concern in *Tilton v. Richardson, supra,* 403 U. S. at 685-86 (1971), and "fostering an ideological outlook", was cited in *Committee for Public Education & Religious Liberty v. Regan,* 444 U. S. 646, 657 (1980). "Proseltizing activities of religious sects" troubled Mr. Justice Stewart in his concurring opinion in *School District of Abington Township v. Schempp,* 374 U. S. 203, 314 (1963). These and other expressions from this Court plainly demonstrate that it is those activities which are the equivalent of the inculcation of religious values which "advance" religion. Those merely employing religious references for purposes of moral inspiration, do not have the requisite advancement effect. This distinction was expressly recognized in the *Schempp* decision which invalidated Bible readings in public schools because the state failed to demonstrate only a genuine inspirational purpose for them. *Id.* at 224.

The distinction is hardly a novel one, for judicial decisions upholding government's use of references to religion for inspirational purposes abound.[6] It was described perhaps most illustratively by Mr. Justice Black, writing for the majority in *Engel v. Vitale,* 370 U. S. 421, 435, n. 21:

> [t]here is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical docu-

---

[6] *Aronow v. United States,* 432 F. 2d 242 (9th Cir. 1970) ("In God we Trust" motto on federal currency); *O'Hair v. Paine,* 312 F. Supp. 434 (W. D. Tex. 1969), *aff'd,* 432 F. 2d 66 (5th Cir. 1970) (broadcasting astronauts reading Bible from space); *Anderson v. Salt Lake City Corp.,* 475 F. 2d 29 (10th Cir. 1973), *cert. denied,* 414 U. S. 879 (1973) (granite monolith inscribed with Ten Commandments on courthouse grounds).

> ments such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's profession of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State . . . has sponsored in this instance.

The legislative prayers are intended by the Legislature to be nothing more than a traditional, ceremonial step taken each day to open its proceedings. The activity is a matter of internal daily procedure directed only at the legislative membership, not at the public at large, and they are a group of politically seasoned, mature adults hardly susceptible to religious indoctrination by such ceremonial prayers. This fact alone distinguishes this case from the leading school prayer cases. *See, School District of Abington Township v. Schempp, supra* at 299-300.

Neither respondent nor Frank Lewis, Chairman of the Executive Board, view the prayers as having any personal religious significance; they simply offend respondent's sensibilities. How they are perceived by any other legislators is unknown because none were called to testify. Respondent is free to absent himself during the offering of the morning prayers and usually does so with no attempt being made to restrain him. On the basis of this showing, the conclusion of the District Court that "the primary effect of the prayers . . . is neither to advance nor inhibit religion," is the only one possible.

3. The Legislative Prayers Involve No Excessive Entanglement Between Government and Religion.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court identified three factors as controlling the entanglement inquiry: (1) the character and purposes of the

benefitted institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the state and the religious authority. *Id.* at 615.

The Nebraska prayers are provided for at a minimum of inconvenience to and administrative involvement of the Legislature. It's rules provide that a single Chaplain be retained, essentially as a legislative employee, to serve throughout each two-year legislative session. The Legislature's administrative involvement with the prayer practice ends after a single majority vote of the Executive Board is approved by the Legislature. No input is provided with respect to the preparation of the prayers, that matter being left entirely to the Chaplain. Selection of the Chaplain has been undertaken in a perfunctory manner, and no evidence exists that it has ever been a subject of internal concern. (J. A. 65-66)

With respect to the nature of the institutions aided, the inescapable fact is that no religious institution whatsoever is aided directly by the prayer practice. The Chaplain renders his services as an individual, not as a member of his church, and no benefit to his church has resulted from his service over the years as Chaplain. There simply is no resulting relationship between the state and any religious authority.

The Court in *Lemon, supra* at 622, also pointed out that the potential for political divisiveness represented another kind of church-state entanglement forbidden by the Establishment Clause. It explained further that what it was concerned about was the realistic potential for "political fragmentation . . . on religious lines." *Id.* at 623. The record herein reveals not the slightest hint of the kind of political divisiveness contemplated in *Lemon.*

To suggest that in the administration of its own internal affairs the Legislature's decision to open each

of its days with a ceremonial prayer entails the risk of serious political division along religious lines throughout the State of Nebraska stretches the limits of credulity, and most certainly the record. There is no evidence that anyone beyond the legislative chamber even knows there is a Chaplain, which is not surprising since the legislative prayers respect only a matter of internal procedure and are not directed at the public. There simply is no excessive entanglement problem here.

III.

The Compensation of the Chaplain Has No Purpose and Effect Other Than to Facilitate the Legislative Prayers, and thus, Cannot Render the Entire Prayer Practice Unconstitutional.

A. Nothing about cash payments from public funds as a form of aid is suspect under the Establishment Clause.

While respondent has complained of the compensation of the Chaplain in addition to prayers themselves, he has done so only because the compensation makes possible the prayers. No allegations appear in the complaint regarding any independent basis for challenging the Chaplain's compensation, and that issue was not independently set out in the pre-trial order. Moreover, respondent testified that while a member of the Executive Board he attempted to terminate the Chaplain's compensation only after first failing to persuade it to terminate the prayer practice all together. (R. 7) He also made perfectly clear during the cross-examination that his objection to the compensation was merely an extension of his principal objection to the legislative prayers. (J. A. 30)

Viewed in this light, of the fact of compensation itself can contravene the Establishment Clause in only

two ways. Either cash payments from public funds are impermissible as a form of aid, or the use to which the funds are put is violative of the clause. Since the purpose of compensation is to facilitate provision of the legislative prayers and the prayers alone do not transgress the clause, the only remaining question is whether compensation as a form of aid is suspect for that reason alone.

In *Committee for Public Education & Religious Liberty v. Regan*, 444 U. S. 646 (1980), New York statutes providing for direct cash reimbursements to nonpublic schools for administering and grading certain state-prescribed examinations were under scrutiny. In addressing whether or not an Establishment Clause violation could arise merely because the assistance in that case came in the form of direct cash reimbursements, the Court noted:

> But as we have already concluded, grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect. This conclusion is not changed simply because the State pays the school for performing the grading function. As the District Court observed, "[p]utting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect."

Id. at 657-658.

Even had the court not squarely addressed this issue in *Regan*, its conclusion therein that "None of our cases requires us to invalidate these reimbursements simply be-

cause they involve payments in cash", *id.* at 658, certainly could have been gleaned from other decisions tacitly recognizing the same principle. *Tilton v. Richardson*, 403 U. S. 672 (1971), *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U. S. 756 (1973) and *Roemer v. Maryland Board of Public Works*, 426 U. S. 736 (1976), all demonstrate that government assistance in the form of grants or payments of public funds arouses no suspicion under the Establishment Clause so long as the uses to which the funds are put are permitted thereby. The determination turns on the underlying use or activity made possible by the funding, not the mere act of funding itself. It naturally follows that where the only purpose of compensating the Chaplain is to facilitate the provision of the daily legislative prayers, that element alone cannot transform the entire prayer practice into one which has no secular purpose, or has a primary effect advancing religion, or excessively entangles government and religion. The record bears out this conclusion.

Having no purpose but to facilitate the prayers, the compensation is inexorably linked to the purpose of the prayers, already shown to be secular. There is not the slightest indication of any effect on religion by virtue only of the Chaplain's compensation, due of course to the fact that he is retained as an invidual and is paid as a legislative employee, by check made out to him personally and deposited in his personal bank account. Finally, the Chaplain's compensation, handled the usual administrative manner by which the Legisture monthly compensates all of its employees. This in no way resembles the kind of entanglement, if any at all, between government and religious authority of concern to the court in *Lemon*.

B. The findings that compensation of the Chaplain had the effect of promoting one religious view and engendered serious political division along religious lines is contrary to the evidence and was cited only as an outgrowth of the Chaplain's tenure.

The actual analysis of the Nebraska prayer practice by the Court of Appeals was conspicuously terse. More conspicuous was the court's complete failure to cite any facts from the record or a single authority in support of its conclusions. The compensation of the Chaplain was found to contribute to the unconstitutionality of the prayer practice taken as a whole, not because of the nature of the prayers or because compensation from public funds was seen as an impermissible form of aid, but apparently because the compensation was felt to have had the effect of promoting one particular religious view. (Pet. App. 37) Not only is there no evidence in the record to support this conclusion, but what evidence there is completely undercuts such a finding.

The practical, and secular, necessity for the Nebraska Legislature to provide its legislative prayers with a compensated Chaplain is readily apparent. Clergy residing in and around Lincoln are hardly beating down the door of the legislative chamber for an invitation to offer the legislative prayers. The Chaplain's own experience in soliciting other clergy to occasionally provide even one prayer illustrates that quite the contrary is true. (J. A. 90-91) Against this background, the Legislature has done the only thing it could to ensure that there will be a prayer every morning at minimum of administrative inconvenience and oversight. It has hired one person to take total responsibility for that function, which entails no small amount of time and effort.

The only effect of compensating the Chaplain, which is as old a custom as the prayers themselves dating back to 1867 in Nebraska, to be gleaned from the record is that it has indeed made possible the legislative prayers each morning with a minimum of administrative oversight by the Legislature. He is compensated once every month in the same manner that every other legislative employee is, and his appointment each session has never been that big of an issue for the Legislature, but rather a perfunctory routine. (R. 116, 121)

The Court of Appeals realized that having reaffirmed its prior conclusion in *Bogen v. Doty, supra,* approving prayers at public gatherings, it would be incongruous for it to hold that merely paying for the provision of such prayers was improper. To avoid this incongrity, it linked its concern for the compensation to the fact that it had flowed to a single cleric for a long period of time. "The state has placed its official seal of approval on one religious view for sixteen years and has stood behind that seal with its funds — both to compensate the minister and to publish his prayer books." (Pet. App. 37) Presumably, then, the Court of Appeals would allow compensation of a Chaplain who served less than "an extended period of time." (Pet. App. 38)

So viewed, the decision of the Court of Appeals is seen actually to turn on only one question, that being whether or not the retention of a single cleric as Chaplain for an extended period of time has the effect of preferring one view of religion over others. Compensation is relevant only as it might reinforce any undesired effect stemming from the lengthy tenure. This observation is confirmed in noting the court's additional conclusion that "using State monies to compensate the same minister for

16 years" engenders serious political division along religious lines. Again, compensation is merely an adjunct to and dependent on the impermissibility of lengthy tenure. It is the single question of tenure, then, which will be dispositive of this case.

IV.

The Retention of a Single Cleric as Legislative Chaplain for an Extended Period of Time Poses No Establishment Clause Problem.

Analysis of the court's reasoning finding fault with the prayer practice because of the Chaplain's lengthy tenure reveals it to be the product of a bemusing failure to take account of facts contained in the record, as well as the failure to properly apply relevant legal principles. The court first found the legislative practice had a purpose of advancing and giving preference to one religious view over others because it could find no other reason for retaining a single Chaplain for so long. It then proceeded to find a primary effect of preference of one religious view over all others, again because a single cleric had been retained as Chaplain for 16 years. Finally, the court found that compensating a single cleric for Chaplain for that length of time engendered serious political division along religious lines. The finding on each of the *Lemon* prongs derives directly from Palmer's tenure. (Pet. App. 36-37)

The first flaw in the court's opinion on the tenure question is that it simply does not square with the facts in the record. The court reminded itself that legislative prayers by clerics as a method of calling the legislative bodies to order are constitutional, citing one of its own prior decisions. (Pet. App. 35-36) Thereby, it found at least that there was nothing suspect about the nature of

prayers such as Palmer has given for 16 years, or about the fact they are daily offered by a cleric. What troubled the court was that one particular cleric should be retained to perform that function for such a lengthy period of time. This concern was not based on evidence in the record, but simply because in that court's view "there is little other reason for singling out one minister of one denomination for such an extended period of time."

There clearly is a secular purpose for retaining a single cleric over time reflected in the record, and to ignore it as the Court of Appeals did is a grievous departure from the proper Establishment Clause analysis. Since its inception, the legislative prayer practice has represented merely the continuation of a ceremonial tradition. It simply has not been that big of an issue in the ongoing legislative process in the State of Nebraska. It naturally has been in the interest of the Legislature to thus provide for the service in a manner requiring as little administrative oversight and inconvenience as possible. The Legislature has chosen that course and indeed, the retention of a Chaplain and the other ceremonial officers has come to be a perfunctory chore. So long as a particular Chaplain carries out his responsibility satisfactorily, there has been no need to make a change. As Executive Board Chairman Lewis pointed out, were the Legislature to arbitrarily select a new Chaplain at frequent intervals, the Legislature would become embroiled in a detailed selection process similar to what it goes through for hiring its non-ceremonial employees. (J. A. 65) The Legislature obviously has not found that a frequent turnover of Chaplains is necessary to ensure that the prayer practice continue as a ceremonial tradition. Palmer himself, was retained for several sessions only because he did a good job and was felt not to have

rejected any particular religious doctrine in his prayers which would have required his replacement. (J. A. 68)

The Court of Appeal's conclusion that there was no reason for retaining Palmer for 15 years cannot be reconciled with these facts contained in the record. Furthermore, the alternative suggested by the court, administering a frequent turnover of Chaplains, would force the Legislature toward a more questionable degree of entanglement with religion that it so far has been able to avoid. There is no reason to require such a substantial administive commitment to so insignificant a matter of internal legislative procedure.

There are additional flaws in the reasoning of the Court of Appeals. The finding of a preference of one religious view clearly was linked to Palmer's denomination affiliation. The court stated as much in concluding that "those who have observed or participated in Nebraska's legislative process over the last 16 years would have to conclude that the Legislature has an official view on religion which is expressed by its *minister* and promoted with the use of State funds." (Pet. App. 37) So viewed, Palmer was denied a lengthy tenure as Chaplain not because there was anything suspect about the task he performed, but because of his denominational affiliation, which after all is what makes him a cleric.

Such a result is foreclosed by the well-settled principle that the Establishment Clause may not preclude the state from employing clerics, or even clerical orders, in the performance of secular tasks. *Bradfield v. Roberts*, 175 U. S. 291 (1899); *Roemer v. Maryland Public Works Board*, 426 U. S. 736, 746 (1976); *McDaniel v. Paty*, 435 U. S. 618 (1978). As was explained in *Roemer, supra*, at 746, n. 13, to deny an individual the opportunity to en-

gage in secular activities merely because he is a cleric would amount to nothing less than discrimination against him on the basis of his religion.

The court's judgment on the question of tenure is misguided for an additional reason. That the continued retention of the same Chaplain might be looked upon by some as a preference for a particular religious view seemed significant to the court. "Those who have observed or participated in Nebraska's legislative process over the last sixteen years would have to conclude that the legislature has an official view on religion which is expressed by its minister and promoted with the use of State funds." (Pet. App. 37) However, at the most, such a perception would amount to only an indirect or incidental effect beneficial to religion, and such an effect has never been thought a sufficient defect to warrant invalidation of a state law under the Establishment Clause. *Committee for Public Education v. Nyquist, supra,* 413 U. S. at 775. Were this the case, this court could never have decided *McGowan v. Maryland, supra,* as it did, for it was undeniable that the Sunday closing laws therein upheld fostered respect for religious observances and facilitated church attendance. It is the fact of an official preferred view on religion which might run afoul of the Establishment Clause, not the mere appearance of such a preference.

The fact of the matter is that legislative Chaplains of lengthy tenure are just as much a part of the history of legislative prayer practices as the morning prayers themselves are and can be validated on that basis alone. The Court of Appeals would have done well to have remembered the words of Mr. Justice Goldberg, concurring in *School District of Abington Township v. Schempp, supra,* 374 U. S. at 308:

The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can flow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

V.

The Occasional Printing of Prayer Books by the Nebraska Legislature Is of No Independent Significance in This Case, but Was of Concern to the Court of Appeals Only Because It Was Perceived As Stemming From the Tenure of Chaplain Palmer.

In addition to the compensation and tenure of the Chaplain, the Court of Appeals also singled out the printing of prayer books on three separate occasions in the late 1970's, as contributing to its determination that the entire legislative prayer practice in Nebraska was unconstitutional. It is significant to note that the court did not view the mere publishing of the prayer books standing alone to be improper. Rather, its problem was with the fact that the prayers included in the prayer books were those of one particular minister. (Pet. App. 36-37) Once again, the court's principal objection is the Chaplain's tenure, and the prayer books are a mere extension of that objection. After all, Palmer's prayers had been given for 10 full years before the first book was produced.

Inasmuch as there is nothing constitutionally impermissible about retaining a single cleric over a period of time to serve as Chaplain so long as he performs a secular task, the concern of the Court of Appeals over the printing of the prayer books can be laid to rest.

Viewed independent of the Chaplain's tenure, there should be no question but that the mere act of occasionally printing legislative prayer books for distribution to the legislative membership in limited quantities, and to anyone else requesting them as long as the supply lasts, does not offend the Establishment Clause. No more than 200 copies of any prayer book were ever printed, which is the best evidence that the Legislature hardly intended thereby to go public with an "official" view on religion.

Petitioners further submit that the prayers themselves, and thus the prayer books, hardly manifest one particular religious view. They, or others similar to them, could have been offered by virtually any cleric. (J. A. 76) The printing of each book resulted from a separate motion from the floor. (J. A. 13) It in no way has ever been a part of the legislative prayer practice established by legislative rule to print up the prayers. The prayer books were approved quite obviously with the thought in mind that having been inspirational when first given, their collection in the prayer books might prolong their inspiration. Since the prayers were permissible for that purpose when offered by the Chaplain, there can be little basis for finding problem with their printing in this kind of prayer book under these circumstances.

The record is simply devoid of the slightest hint that the occasional printing of the prayer books in such limited quantity in any realistic sense has alone produced a direct and immediate effect of advancing religion. This is hardly surprising in light of the fact that up to the filing of this action, the prayers had always appeared in the legislative journal with no consequence whatever, and it is a safe bet that the daily legislative journal enjoyed far greater circulation among the public than did the handful of prayer books.

CONCLUSION

The question presented to this court for review has been changed significantly from that which the parties believed they were litigating at the time of trial. As the record reflects, respondent's case pursued a single, narrow theme, namely that since the prayers in the legislative chamber each morning were religious in nature, they represented the kind of religious activity proscribed by the Establishment Clause. Since the prayers were improper, the payment of a Chaplain to provide the prayers was improper. This was the central question to which the parties addressed themselves in their evidence and in their argument at trial.

The decisions of the District Court and the Court of Appeals for the Eighth Circuit cast the central question in an entirely different light. Following the lead of countless other judicial expressions on the constitutionality of prayers given to open public gatherings, both courts found that prayers to begin each legislative day's sitting were constitutionally sound without questioning their nature or content. Rather, the courts proceeded to find a problem of constitutional dimension because of the compensation and the tenure of the Nebraska Chaplain, facets of the legislative prayer practice presumed by the parties to be of no independent significance. The question became whether the fact that the Nebraska Chaplain is compensated and has been retained for an extended period of time transform an otherwise constitutional prayer practice into an unconstitutional one.

Proper analysis of this question by application of the Establishment Clause principles provided by this Court requires that the answer be no. The compensation and tenure of the Chaplain in this case, on the basis of this record, are seen to have no significance independent of

the legislative prayers themselves just as the parties originally had perceived. Both attributes of the prayer practice taken as a whole are as time-honored in history as the prayers themselves, and have no other purpose or effect but to ensure the provision of the prayers on a continuing basis with a minimum of inconvenience and administrative oversight.

That other legislatures have managed to provide for legislative prayers by rotating and/or unpaid clerics is of no consequence here. The pivotal inquiry is not whether the Nebraska Legislature might have provided for its legislative prayers differently, but whether the manner by which it has chosen to provide the prayers is constitutionally sound standing by itself. The record demonstrates no other purpose or effect of the compensation and retention of the Chaplain other than to ensure the day to day provision of the legislative prayers in a constitutionally permissible manner. The Nebraska practice by any realistic measure represents none of the dangers the Establishment Clause was designed to prevent, nor any direct or substantial involvement of the state and religious authority having any practical impact beyond bringing the legislative chamber to order each morning that it sits.

For the foregoing reasons, petitioners respectfully request this court to reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,
FRANK MARSH, State Treasurer, and
ROBERT E. PALMER, Chaplain of the
Nebraska Unicameral, Petitioners.
By PAUL L. DOUGLAS
Attorney General
By SHANLER D. CRONK
Assistant Attorney General
Attorneys for Petitioners